

SOUTH AFRICA / JUDGMENT

Kruger v Firststrand Bank Limited (2009/51345) [2017] ZAGPPHC 252 (6 June 2017) [2017] ZAGPPHC 252

COURT

North Gauteng High Court, Pretoria

BEFORE

L Adams

CASE / FILE NUMBER

2009/51345

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 2009/51345

Reportable:

No

Of

interest to other judges: No

Revised.

6/6/2017

In

the matter between:

KRUGER: BAREND JOHANNES
Applicant
/ Defendant
and
FIRSTRAND
BANK
LIMITED Respondent
/ Plaintiff

JUDGMENT

ADAMS J:

[1]. This is an application by the applicant to rescind and set aside a judgment by default granted against him by this court (Manamela AJ) on the 12th December 2014. The default judgment is for payment of the sum of R1,480,486.54, together with interest thereon and an order in terms of which the applicant's immovable property, being R E Erf [...] Wapadrans Extension 1 Township, registration division J R, Gauteng Province, measuring 1201 square metres, held in terms of D/T No T105948/2007 ('the property'), was declared specially executable as envisaged in terms of Rule 46(1)(a). The applicant was also ordered to pay the respondent's cost on the scale as between attorney and client.

[2]. The default judgment was founded on a written loan agreement concluded between the applicant and the respondent on the 21st June 2007. The loan was secured by the registration of a Covering Mortgage Bond over the property in favour of the respondent. Initially the amount of the loan, together with interest thereon, was to be repaid by the applicant to the respondent by way of instalments of R16,364.62 per month via debit orders on the 4th day of each month until the debt has been liquidated in full.

[3]. During July 2009 the applicant fell into arrears with his monthly instalments, and the respondent proceeded with the issue of a summons, claiming from the appellant, as it was entitled to do in terms of the loan agreement, payment of the whole amount then outstanding, being R1,534,267.77, together with interest thereon, an order to declare the property specially executable and cost of suit. The summons was served on the applicant on the 21st of August 2009, and he subsequently entered an appearance to defend.

[4]. Thereafter the respondent delivered an application for summary judgment, which was opposed by the applicant on the basis that subsequent to the service of the summons the parties had settled the dispute forming the subject of the action on the basis that the applicant would pay to the respondent an amount of the R13,000.00 per month and that the loan period would be extended to 30 years. This settlement agreement was recorded in an email dated the 8th September 2009 from the applicant to the respondent, and it was a term of the settlement agreement that 'all legal steps [would] be pending on condition that [the applicant] pays the R13,000.00 every month'. In light of the foregoing the application for summary judgment, which had been set down for hearing on the 3rd December 2009, was postponed sine die on the

aforesaid date. This was done on the understanding that the dispute had been settled between the parties, the debt 'restructured' and that the litigation would be pended. Not much more than the foregoing was agreed upon and the matter was seemingly left at that.

After a scuffle between the parties ex post facto the postponement regarding who should be liable to pay the costs of the application for summary judgment, the respondent agreed to pay an agreed amount in settlement of the cost of the application for summary judgment.

[5]. In the period following December 2009 all was seemingly well in the land in that the applicant kept to his side of the bargain and paid the monthly instalments as per the restructured agreement. However, during early 2014 the applicant fell into arrears with his instalments, and the respondent, believing that it could simply fall back on its original cause of action, advised the applicant that it would be proceeding with the action it had previously instituted against the applicant. This, the respondent did, by firstly delivering a formal notice of withdrawal of the application for summary judgment, which for all intents and purposes, was still pending at that stage, the hearing having been postponed during December 2009, and secondly by delivering a notice of bar in term of rule 26 of the Uniform Rules.

[6]. The notice of bar was however delivered prematurely in that it was delivered prior to the expiration of the period within which defendant's plea was due. If a plaintiff, after serving and filing an application for summary judgment, serves and files a notice of bar on the defendant, the plaintiff acts in error and the defendant can apply to court to set aside the notice of bar as an irregular step in terms of rule 30. Accordingly, the filing of the notice of bar by the respondent was irregular as was the

subsequent application for judgment by default based on the irregular notice of bar.

[7]. The applicant did not file his plea as he was of the view that the respondent was not entitled to proceed on the original cause of action, and advised the respondent accordingly. He also did not oppose the application for default judgment, despite the fact that he had received notice of the application for judgment by default.

[8]. There can be no doubt that the judgment was granted in error and the provisions of rule 42(1) (a) find application.

the application for rescission

[9]. The application for rescission is brought in terms of the provisions of Rule 42(1) of the Uniform Rules of Court and / or in terms of the Common Law.

[10]. It is trite that in terms of the common law, an applicant, in order to be successful in an application for rescission, is required

to show good cause.

[11]. Generally, an applicant will establish good cause by giving a reasonable explanation for his default and by showing that he has a

bona fide defence to the claim of the respondent which prima facie has some prospect of success. In terms of Rule 42(1)(a), the Court may rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[12]. I am of the view that the judgment granted by Manamela AJ was erroneously sought and erroneously granted on the basis that the applicant was in default of delivering his plea. The default judgment did not take into account the fact that by the time the respondent caused the notice of bar in terms of rule 26 to be delivered, the defendant's plea was not yet due. Therefore, applicant could

not have been in default of delivering his plea, as the notice of bar was delivered prematurely.

[13]. On this basis alone, the judgment should be rescinded. In that regard, I have had regard to the provisions of rule 42(1)(a).

[14]. The following principles govern rescission under rule 42(1)(a):

14.1 The rule must be understood against its common-law background;

14.2 The basic principle at common law is that once a judgment has been granted, the judge becomes functus officio, but subject to certain exceptions of which rule 42(1)(a) is one;

14.3 The rule caters for a mistake in the proceedings;

14.4 The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;

14.5 A judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;

14.6 The error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and

14.7 The applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).

[15]. In order to obtain a rescission under this subrule the applicant must show that the prior order was 'erroneously sought or erroneously granted in the absence of any party affected thereby.' Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause for the subrule to apply.

[16]. An order or judgment is also erroneously granted if there was an irregularity in the proceedings, as was the case in casu. The judgment therefore stands to be set aside.

[17]. In any event, I am of the view that in his founding affidavit the applicant satisfactorily explained his default and demonstrated

that he has a bona fide defence to the judgment granted by Manamela AJ. His defence was one of compromise, and, on paper at least, this is a good defence. His explanation for his default was simply that the respondent had no business acting in the irregular manner it did and genuinely did not think that it would proceed to apply for and obtain judgment against him.

[18]. If given an opportunity the applicant will raise the defence of compromise, read with section 129 of the National Credit Act no 34 of 2005, which has as a concomitant the defence that the respondent cannot and should proceed on the original cause of action, as same has been novated, and the respondent has not reserved his right to proceed on the cause of action as pleaded in its particulars of claim.

[19]. Having regard to all the circumstances in this matter, I am persuaded that the applicant has established a bona fide defence that carries some prospect of success.

[20]. I am of the view that the applicant has demonstrated the existence of a bona fide defence on the substantive merits of the Respondent's claim. In *Chetty v Law Society, Transvaal*[1], Miller J said the following about the two elementary requirements of common law, the test of sufficient cause:

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. Any ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits"

[21]. I am satisfied that the application for rescission of the order granted on 12th December 2014 should succeed. Accordingly, I intend granting the application to set aside and rescind the said order.

COSTS

[22]. I believe that an appropriate cost order relative to this application for rescission is that cost should be in the cause of the main action. It is so that the applicant was somewhat recalcitrant in not doing anything on receipt of firstly the notice of bar in terms of rule 26 and then the application for default judgment. However, by the same token, the respondent should not have proceeded on a cause of action which had been novated.

[23]. I therefore intend, in the exercise of my discretion, to order that the costs of this application shall be in the cause of the main action.

order

Accordingly, I make the following order:

1. The applicant's application for rescission is granted.
2. The judgment by default granted against the applicant in favour of the respondent on the 12th December 2014 be and is hereby set aside and rescinded.
3. The applicant shall deliver his plea within 20 days from date of this order.
4. The costs of this application for rescission shall be in the cause of the main action.

L ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 5th June 2017

JUDGMENT

DATE: FOR THE APPLICANT: 6th June 2017 Adv F Bezuidenhout INSTRUCTED BY: B J Kruger
Attorneys FOR THE RESPONDENTS: Adv M Reneke INSTRUCTED BY: Bezuidenhout, Van Zyl &
Associates

[1] 1985 (2) SA 756 (A).

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Prepared on 23 October 2026 · Esheria